STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2006
v	No. 258200 St. Clair Circuit Court
DECHAUN ANDREW SMITH, Defendant-Appellant.	LC No. 04-000864-FH

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii), carrying a concealed weapon, MCL 750.227, and felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant first argues that the trial court erred in not holding an evidentiary hearing to determine whether evidence should be suppressed and in not enforcing its discovery orders. We review a trial court's decision to hold an evidentiary hearing for abuse of discretion. *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987). An abuse of discretion "exists where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). In addition, this Court reviews a trial court's findings at a suppression hearing to determine if they are clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). To reverse, this Court must be "left with a definite and firm conviction that a mistake was made." *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). This Court reviews de novo the trial court's legal conclusion that there exists a reasonable suspicion to support a seizure. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994).

A trial court must typically hold an evidentiary hearing in deciding a suppression motion. *People v Talley*, 410 Mich 378, 390-391; 301 NW2d 809 (1981), rev'd on other grounds by *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998). However, if the lawyers agree to have the motion decided on the basis of the preliminary hearing examination transcript and police reports, this "accords with broader principles regarding the respective roles of defense counsel, the prosecuting attorney, and the court." *Id*. at 276, citing MCR 6.110(D).

In the instant case, the record before the trial court came from a police report, not from a preliminary examination, which defendant waived. In making his arguments that evidence should be suppressed because the search and seizure of his vehicle was illegal, defendant relied below on information contained in the police report. Thus, it is untenable for defendant to argue that the very information upon which he relied to argue legal conclusions about the search and seizure may not be relied upon by the trial court to decide the matter. Therefore, because both parties argued solely from the police report, there was an implicit agreement that the trial court could decide the suppression motion on the basis of the police report. See *People v Ledrow*, 53 Mich App 511, 518; 220 NW2d 336 (1974). In addition, defendant's motion for an evidentiary hearing was made after the twenty-one day deadline indicated in the pretrial order. In light of this, it cannot be said that there was "no justification or excuse" for the trial court's denial of defendant's motion for an evidentiary hearing. See *Ullah*, *supra*.

In addition, the trial court's decision to deny defendant's motion to suppress evidence was correct. Police officers may make a "valid investigatory stop if they have a 'reasonable suspicion' that criminal activity is afoot" and have a "particularized and objective" basis to suspect criminal activity. *People v Dunbar*, 264 Mich App 240, 247; 690 NW2d 476 (2004), citing *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996). An officer's reasonable suspicion may be based on information from a confidential informant. *People v Tooks*, 403 Mich 568, 575-576; 271 NW2d 503 (1978). For the suspicion to be reasonable, the informant's information must be reliable. *Id*. Reliability of the informant's information is determined by: "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." *Id*., citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and *Adams v Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972).

In the instant case, the trial court found, based on the police report at the suppression hearing, that: (1) the confidential informant was reliable (this informant had previously assisted the police), (2) the confidential informant's information was specific (the informant gave the police information about defendant's vehicle, license plates, and a description of the persons who would be carrying drugs), and (3) the police activity was therefore reasonable. These findings satisfied each prong of the *Tooks* test. Additionally, although defendant now argues that there was no stipulation to agreed upon facts, defendant below relied upon the facts as set forth in the police report to argue legal conclusions regarding the legality of the search and seizure rather than arguing that an evidentiary hearing was required to make legal conclusions. Therefore, the trial court's findings, based on the same police report used by defendant to draw legal conclusions, were not clearly erroneous.

Second, defendant claims that the trial court erred in not enforcing its discovery orders to compel the production of evidence and order sanctions, as well as in failing to hold an evidentiary hearing. We review the trial court's ruling on discovery issues for abuse of discretion. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994).

It is within the discretion of the trial court to grant further discovery. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997). Also, it is within the trial court's discretion to fashion a remedy for noncompliance. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). The trial court may modify the discovery rules where there is good cause shown. MCR 6.201(I); *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001). The trial court's

exercise of this discretion "involves a balancing of the interests of the courts, the parties and the public, including an examination of the reason for noncompliance and resultant prejudice." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

In balancing the parties' interests in the case at hand, the trial court did not abuse its discretion during discovery for several reasons. Regarding the trial court's May 10, 2004, order compelling discovery of videotapes, the prosecution demonstrated that it was unable to make contact with the St. Clair County Drug Task Force (DTF) until June 3, 2004, whereupon it was learned that no tapes were used in the investigation. Additionally, the prosecution sent the trial court's order attached to a memorandum dated May 14, 2004, requesting the DTF to forward copies of any videotapes to the prosecutor's office. Thus, an examination of the prosecution's reason for noncompliance reveals that not only did the prosecution attempt to comply with the trial court's order, but that the prosecution showed good cause for complying only several days late.

Second, defendant has not shown any prejudice that resulted from the prosecution's delay in complying with the order because the tapes were not used in the investigation and arrest. Thus, even timely compliance would not have changed the outcome for defendant. Further, the trial court instructed the prosecution at the motion hearing to be available to defendant to further explain this issue. In addition, the court noted that even if the tapes did exist, it would not allow the prosecution to present them at trial. Because good cause was shown, it was within the trial court's discretion to fashion its own remedy for any noncompliance with discovery. *Williams*, *supra* at 58-59. In light of the fact that before trial, the prosecution explained that the tapes had been put back into service and reused because they had not been marked as evidence, defendant has failed to show that the trial court's enforcement of its orders, and decision not to award sanctions or hold an evidentiary hearing prejudiced him. Therefore, because the prosecution showed good cause and defendant was not prejudiced, the trial court did not abuse its discretion during discovery.

Third, defendant argues that the prosecution violated his due process rights to a fair trial because the prosecution withheld evidence. We review de novo the issue of whether defendant was denied his due process rights as a result of prosecutorial misconduct. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).

A defendant generally possesses no constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). However, due process requires the disclosure of exculpatory and material evidence that the prosecutor has in his or her possession.[1] *People v*

[1] During discovery, the prosecutor must provide defendant with: "(1) any exculpatory information the prosecutor knows; (2) police reports concerning the case; (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective trial witness; (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and (5) any plea agreement, grant of immunity, or other agreement for testimony in the case." MCR 6.201(B); *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). Here, the only issue concerns the prosecution's actions regarding the videotapes and photographs of evidence.

Stanaway, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish that his due process right to disclosure was violated, defendant must demonstrate: "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecutor willfully or inadvertently suppressed the evidence; and (4) that if the evidence had been disclosed to the defendant, it is reasonably probable that the result of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Defendant first argues he was denied access to a videotape used during his arrest. Regarding the tape, the prosecutor explained that any recording was no longer available because the police had reused the tape. Defendant has failed to establish that the unavailability of the tape violated his right to due process. First, defendant has offered no evidence that the state actually possessed the recording of his arrest. Rather, he merely reiterates that the police report refers to a videotape. Second, the record indicates defendant's attempt to obtain these tapes consisted of leaving messages for police officers and asking the prosecutor to call the police.[2] However, "police are not required to seek and find exculpatory evidence." *People v Miller, (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Therefore, these attempts cannot constitute the requisite reasonable diligence because even if defendant contacted the police, they were under no obligation to find evidence that would exculpate him. Third, other than alleging a cover up, defendant has offered no evidence that the prosecutor suppressed the tape.

Finally, defendant only makes conclusory statements that the tape would exculpate him by demonstrating the illegality of the search, but makes no showing of how the tape would have changed the outcome of the trial. Thus, loss of the tape was at most the loss of merely *potentially* exculpatory evidence because nothing in the record proves the tape's content. Therefore, defendant can only show that his due process rights were violated if he can show bad faith on the part of the police. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988) (a defendant must show the police acted in bad faith to establish a due process violation regarding potentially useful evidence). The most defendant has asserted is that he left the police phone messages. However, defendant has made no showing of bad faith. Thus, having failed to make any of the required showings or to put forth any evidence in support of his claims, defendant has not established that the prosecutor violated his due process right to a fair trial. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Defendant also argues that the prosecution withheld photographs of the car stopped by the police in this case. However, the record directly contradicts defendant's claim that the prosecutor did not provide photographic evidence prior to the commencement of the trial. The trial court ordered the prosecutor to make the photographs available to defendant during the break before the trial began. It is undisputed that defendant had access to the photographs. In fact, defendant admits he had ten minutes prior to trial to examine the photographs. Other than asserting that this short time frame hampered his opportunity for a fair trial, defendant has made no showing how this affected the outcome of the trial. Moreover, there is not one instance in the record wherein defendant objected to introduction of the photographs into evidence. In *Lansing*

[2] It should be noted that defendant did not offer any evidence in support of his assertion that he attempted to contact the police.

v Hartsuff, 213 Mich App 338, 351; 539 NW2d 781 (1995), this Court ruled that the trial court in that case did not abuse its discretion in allowing the defense counsel twenty minutes to review a police report during trial because the defendants failed to show how this materially affected their case. Similarly, defendant in the instant case cannot successfully argue that the short time frame to view photographs prejudiced him when he has made no showing concerning how his case was materially affected.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot